

March 28, 2019

Writer's Direct Contact
+1 (202) 887.6940
JPalmore@mofo.comVIA ELECTRONIC FILINGMs. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554Re: Notice of Ex Parte Presentation, *In re Best Doctor's, Inc.'s Petition for Declaratory Ruling*, CG Docket Nos. 02-278 & 05-338.

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, I write to provide notice that on March 26, 2019, counsel for Enclarity Inc. had two meetings at the Commission to discuss the above proceeding. In attendance at both meetings were Morrison & Foerster LLP attorneys Joseph R. Palmore and Bryan J. Leitch (on behalf of Enclarity) and Greenberg Traurig, LLP, attorneys David G. Thomas and Debra McGuire Mercer (on behalf of Best Doctors, Inc.). The first meeting was with Kurt Schroeder, Mark Stone, Daniel Margolis, and Rebecca Hirselj (all of the Consumer & Governmental Affairs Bureau). The second meeting was with Zenji Nakazawa, Chairman Pai's Public Safety & Consumer Protection Advisor.

In the meetings, Enclarity urged the Commission to grant the petition for declaratory ruling filed by Best Doctors, Inc., on the meaning of the term "advertisement" in the Telephone Consumer Protection Act, 47 U.S.C. § 227.¹ Enclarity explained that under the plain terms of the TCPA, an "advertisement" is a communication that proposes a commercial transaction between sender and recipient, *i.e.*, a communication by which the sender tries to sell the recipient something. The statutory text, moreover, limits the relevant analysis to the four corners of the fax. Because the TCPA covers only the sending of an "advertisement" to a fax machine, 47 U.S.C. § 227(b)(1)(C), any information beyond the face of the fax is irrelevant since, by definition, such information was not sent to any fax machine.

¹ Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling by Best Doctors, Inc., CG Docket Nos. 02-278 & 05-338, DA 18-1296 (rel. Dec. 21, 2018). Enclarity filed comments in support of that petition. Comments of Enclarity, Inc., *In the Matter of Best Doctor's, Inc.'s Petition for Declaratory Ruling*, CG Docket No. 02-278 (FCC Jan. 25, 2019), <https://ecfsapi.fcc.gov/file/1012557406850/Enclarity%20FCC%20Comments%202019-01-25.pdf>.

Enclarity noted that, despite that straightforward statutory analysis, courts have taken inconsistent approaches when evaluating what constitutes an “advertisement” under the TCPA. Given the ever-increasing volume of TCPA litigation, Enclarity explained, district courts need tools to screen out meritless cases on the pleadings and should be able to dismiss TCPA fax cases not involving “advertisements” without subjecting defendants to the burdens of discovery. But courts’ misunderstanding of what constitutes an “advertisement” has proven an obstacle to such dismissals.

Enclarity explained that it is currently defending TCPA lawsuits based on a purely informational fax that asked recipients only to verify or update their contact information.² After showing the Commission representatives the Enclarity fax at issue in those suits (attached to this letter), Enclarity explained that the fax cannot be an “advertisement” under the TCPA because it did not propose or initiate a commercial transaction with recipients. The fax contains no pricing, ordering, or sales information, and it offers no product or service to anyone.

For those reasons, the district court in one of Enclarity’s cases dismissed the TCPA claim at the pleadings stage, relying in part on the Commission’s 2006 Order discussing TCPA faxes. *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, No. 16-13777, 2017 U.S. Dist. LEXIS 28439 (E.D. Mich. Mar. 1, 2017) (citing *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006)). Yet the Sixth Circuit reversed. Adopting a theory first articulated by the Second Circuit, the panel majority held that plaintiffs can assert a plausible TCPA violation at the pleadings stage by simply alleging a “commercial nexus” between a fax and its sender’s business. *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 907 F.3d 948 (6th Cir. 2018). Notably, however, in reversing the district court the Sixth Circuit relied on the same 2006 FCC Order on which the district court had partly based its decision. *Compare id.* at 954-55 (citing 71 Fed. Reg. 25,967, 25,973), *with Enclarity*, 2017 U.S. Dist. LEXIS 28439, at *2-4 (citing 71 Fed. Reg. 25,967, 25,973).

As Enclarity explained, the fact that both the district court and the Sixth Circuit in Enclarity’s case relied on the same Commission Order in reaching opposite conclusions about the meaning of “advertisement” underscores the need for the Commission to clarify that statutory term. Enclarity noted that even Supreme Court Justices had commented on the ambiguities of the Commission’s 2006 Order during oral argument the previous day in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* (No. 17-1705). Given this ongoing confusion, Enclarity emphasized that it was incumbent on the Commission to clarify its prior statements on the scope of the TCPA and ensure that it applied only to actual “advertisements.”

For these reasons, Enclarity respectfully asks the Commission to quickly grant Best Doctors’ petition and provide courts and parties needed guidance on the meaning of “advertisement” under the TCPA.

² *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc., et al.*, No. 16-13777 (E.D. Mich.); *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc., et al.*, No. 17-1380 (6th Cir.).

March 28, 2019

Page 3

Respectfully submitted,

/s/ Joseph R. Palmore

Joseph R. Palmore

MORRISON & FOERSTER LLP

2000 Pennsylvania Avenue N.W.

Washington, D.C. 20006

Telephone: (202) 887-6940

JPalmore@mofo.com

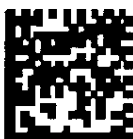
cc: Zenji Nakazawa, Kurt Schroeder, Mark Stone, Daniel Margolis, and Rebecca Hirselj

Enclosure: Enclarity's fax

ENCLOSURE

09/07/2016 07:01 PST

PAGE: 1



Provider: Dr. Matthew Norman Fulton, DDS
Address: 401 N Bridge St, Linden, MI 48451
Practice Phone: (810) 735-7815
Secure Fax: (810) 735-1905

Re: Fax Number Verification for Delivery of Patient PHI (Internal ID:34290748)

The purpose of this Fax Verification Request is to help preserve the privacy and security of your patients' Protected Health Information ("PHI"), as defined by the Health Insurance Portability and Accountability Act ("HIPAA"). LexisNexis is seeking your cooperation to verify or update your information. We validate and update the fax in our system so our clients can use them for clinical summaries, prescription renewals, and other sensitive communications. Verifying the practice address, phone number and your secure fax number (s) for this location will minimize the potential privacy risks that could arise from information sent to an unsecured location. As part of our effort to assure that the transmission of PHI, it is vital to verify the information for Dr. Matthew Norman Fulton, DDS is accurate. This information will be verified once each year.



☐ YES - ALL of the printed information shown above is CORRECT and secure for communications containing PHI.



☐ NO - Updated info Below / Not at this location / Deceased (please circle).

Complete if changed:
Practice Address:
Practice Phone:
Provider Email:
Secure Fax:

SIGN & FAX BACK TO (866) 699-0422

I confirm that the above information is true and correct and safe for communication containing PHI to the best of my knowledge.

Name:
Title(if other than Provider):
Email(if other than Provider):

Signature:

Date:

Comments:

